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In The
SUPREME COURT OF THE UNITED STATES

No.

Term, 1981

UNITED STATES OF AMERICA

vs.

SAMUEL PALADINO,

Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

Where a TWA-owned computer in Kansas City, Missouri transmits impulses to a TWA-owned computer in Pittsburgh, Pennsylvania issuing an airline ticket to a customer in Pittsburgh, Pennsylvania, does the alleged conversion of funds in payment of the ticket by a TWA employee in Pittsburgh constitute fraud in violation of the wire fraud statute enacted by Congress in 1952 as an amendment to the Federal Communications Act of 1934, which enactment was, by legislative history, designed to prevent fraud upon the public by use of Federal Communications Commission regulated facilities?

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SAMUEL PALADINO petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The opinion of the Court of Appeals for the Third Circuit, entered December 31, 1980, is attached hereto as Exhibit A, infra (pp. 1a-10a). The Judgment Order of the Court of Appeals for the Third Circuit, entered December 31, 1980, is attached hereto as Appendix B, infra (p. 11a). The Order of the Court of Appeals for the Third Circuit denying rehearing by the court en banc, dated January 26, 1981, is attached hereto as Appendix C, infra (p.13a).

Jurisdiction

The judgment of the court of appeals was entered on December 31, 1980 (App. A, infra, p. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Where a TWA-owned computer in Kansas City, Missouri transmits impulses to a TWA-owned computer in Pittsburgh, Pennsylvania issuing an

airline ticket to a customer in Pittsburgh, Pennsylvania, does the alleged conversion of funds in payment of the ticket by a TWA employee in Pittsburgh constitute fraud in violation of the wire fraud statute enacted by Congress in 1952 as an amendment to the Federal Communications Act of 1934, which enactment was, by legislative history, designed to prevent fraud upon the public by use of Federal Communications Commission regulated facilities?

Federal Statutes and Issues Involved

18 U.S.C. § 1343 provides as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

The issue involved is whether the wire fraud statute which by legislative history is a part of the Federal Communications Act, and was designed to prevent public fraud especially by radio and television, should be broadly construed to encompass intra-company facilities such as company-owned computers even though such computer impulses might cross state lines.

Statement

Samuel Paladino was an employee of TWA at the Greater Pittsburgh Airport. TWA has computers at the airport which ticket sales persons use to transmit signals to a computer owned by TWA in Kansas City, Missouri. In the course of the use of the computers, lines of the American Telephone & Telegraph Company are used although there is no Federal Communicatons Commission regulation of the computers. The location of the computers was a business decision of TWA and for the convenience of TWA.

Tickets are printed by the impulses sent from Pittsburgh to Kansas City and returned

to Pittsburgh indicating the destination; whether the trips were one-way or round-trip; whether paid for in cash, etc.

Vincent Giovengo, an employee of TWA, testified that on some one-way tickets which were sold for cash, he and the defendant Samuel Paladino conspired to destroy the tickets in such a manner as to cause TWA not to know that the passenger took the flight and thus they would be able to divert the money of the employer to their own use. Samuel Paladino denied at the trial that he had engagedin such a scheme. The jury convicted him of eight counts and acquitted him of one count. Although the defendant continues to deny he is guilty of the charges, the record would indicate a factual issue was presented to the jury and that factual issue was determined against him.

The issue on certiorari is whether the wire fraud statute, 18 U.S.C. § 1343, which was passed as an amendment to the Federal Communications Act of 1934 by Congress in 1952, was meant to cover embezzlement by an employee in the instant factual situation. The salient facts are:

1. TWA owned the computer in Pittsburgh, Pennsylvania.

2. TWA owned the computer in Kansas City, Missouri, and located it there at its sole discretion and for its own purposes and convenience.

3. The computer impulse from Pittsburgh to Kansas City goes over telephone company lines.

4. No part of the transaction which forms the basis of this offense is covered by any regulation of the Federal Communications Commission.

5. The decision to destroy one-way tickets and convert the cash could only be made in Pittsburgh prior to the departure of the plane and under circumstances which would minimize discovery of the action.

The legislative history which will be referred to will indicate that the entire thrust of the amendment of 1952 concerned fraudulent broadcasting in connection with facilities under the Federal Communications Commission in order to preserve and protect the public from fraud in the developing radio and television fields. It is

respectfully submitted that embezzlement by an employee from a company using company-owned facilities was not within the purview of the congressional enactment of an amendment to the Federal Communications Act of 1934.

Reasons For Granting The Writ

In 1952 the computer industry had not even arisen. The entire legislative history regarding the enactment of 18 U.S.C. § 1343 relates to amendments to the Communications Act. The legislative history of P.L. 554, Chapter 879, is entitled "Communications Act Amendments, 1952). See U.S. Congressional & Administrative News, 1952, p. 673. The Act begins by stating that it may be cited as "Communication Act Amendments, 1952". Section 19 of the amendments to the Communication Act inserts a new section in the Criminal Code, making it a crime to utilize broadcasting in any scheme to obtain money or property by false pretenses. The legislative history also, on page 673, states:

> "An act to further amend the Communications Act of 1934."

The Communications Act of 1934, in its report to the 73d Congress, 2d Session, Report No. 781, in an analysis of the bill stated it was the policy of Congress to assure an adequate communications system for the country and to regulate all radio stations and interstate and foreign communications. The definitions are set forth and the duties and obligations of common carriers engaged in communication services and the powers of the Commission relating thereto are referred to.

In the Conference Report to the 73d Congress, the House of Representatives Report No. 1918, Section 1, page 1, the purposes of the Act are referred to as:

> "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and

> radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act."

The House of Representatives in the 82d Congress, 1st Session, Report No. 388, considered an act amending Title 18 U.S.C. with respect to fraud by wire, radio or television and stated that the object of the bill was to amend the Criminal Code by adding a new section making it a federal crime and a criminal offense to use wire or radio communications as an instrumentality for perpetrating frauds upon the public. On page 2 of said report, the committee found:

> "The rapid growth of interstate communications facilities, particularly those of radio and television, has given rise to a variety of fraudulent activities on the part of unscrupulous persons which are not within the reach of existing mail fraud laws, but which are carried out in complete reliance upon the use of wire and radio facilities and without resort to the mails. That this brand of radio misuse to perpetrate frauds has increased to an alarming degree was testified to by the General Counsel of the Federal Communications Commission, who had case

> histories of a host of complaints received by the Commission. The ingenuity of swindlers gravitates naturally to those unethical practices beyond the specific sanction of law. . . While the Federal Trade Commission Act (15 U.S.C. 54) provides a criminal penalty for dissemination by radio of fraudulent advertising of foods, drugs, and medicines, we do not believe that this provision has a broad enough application to warrant a conclusion that the bill is not necessary. Nor does the Federal Trade Commission think so."

In connection with said report, the Federal Communications Commission Acting Chairman, Paul A. Walker, advised the House of Representatives that although there was a separate mail-fraud statute in the Criminal Code, it is believed

> ". . . that a similar radio-fraud statute is also necessary. In addition, a statute specifically prohibiting use of radio facilities for fraudulent purposes will, by its very existence, act as a deterrent to any such fraudulent action. A recent article contained in Broadcasting magazine for January 1, 1951, indicates, with numerous citations to actual cases, that the problem has become critical for broadcast licensees and that several preholiday offers are now under investigation by the Bureau of Chief Inspector, United States Post Office Department, to determine whether any mail fraud is involved." Report No. 388, at 5.

The Federal Trade Commission and Chairman advised Congress that:

> "The Commission is of the opinion that the enactment of the proposed legislation would be an added measure for the protection of the consuming public and desires to express its general approval of the measure." Report No. 388, at 6. (Emphasis added)

The statement of Ellis L. Arenson, of the Criminal Division, Department of Justice, indicated that the phraseology of the proposed measure is modeled after the mail fraud statute and is clear and unobjectionable.

> "We would indicate, however, our belief that the cases which involved schemes to defraud, executed by radio and television, will almost invariably involve violations of the mail-fraud statute since the mails will be utilized, in most instances, to transport the fruit of the crime. In several isolated cases which have been considered by the Department of Justice involving frauds perpetrated by a means of radio and television, there was no utilization of the mails to afford a basis for Federal

> prosecution; those frauds, however, were trivial and easily within the prosecutive jurisdiction of the State." Report No. 388, at 11.

The amendment to the Criminal Code as considered in 1951 was not made, but rather the entire proposed criminal sanction was incorporated in the Communications Act amendment of 1952.

It is respectfully submitted that the reason that it was so incorporated is again demonstrated in the Congressional Record of the House, at page 6086, for the year 1951, June 4, where, in referring to H.R. 2948, amending Title 18, with respect to fraud by radio, the clerk read the bill and various members of Congress spoke to it. Congressman Rogers, of Colorado, stated:

> ". . . this bill merely extends to radio the mail fraud type of law that now applies whenever you commit fraud through the United States mail. This makes it an analogous offense over the radio as pertains to the use of the mails." Congressional Record-House, p. 6086.

He later stated that the principal objective of the bill was to eliminate fraudulent radio

advertising in the same manner as schemes to use the mails to defraud are presently barred. In the Congressional Record of the House for July 2, at page 9028, the reference to this section is captioned "Fraud By Radio". In the 1952 Congressional Record of hearings of the House, at page 7397, in the debates on the bill, Congressman Hinshaw stated that while the purpose of the amendment was to effect the issuance of licenses and the procedure of the Commission in respect to broadcasting, the Commission had other functions and duties which are important in nature because they must regulate

> "the transmission of messages by wire communications and wireless communications where they are person to person, where it is not a public dissemination of information; as, for example, the wireless telegraph companies, the ship-to-shore telephones, the amateur radio business, which is very widespread in the United States, the issuance of licenses for the operation of such things as radio on aircraft as well as radio on ships, and a great many other similar purposes."

Nowhere is it suggested, however, that the matters referred to in the amendments to the Communications

Act of 1934 would extend to wire communications which are not in some manner covered and regulated by the Federal Communications Commission.

The one case which interprets the wire fraud statute along the general lines here suggested is United States v. Holmes, 390 F.Supp. 1077 (D.C. W.D. Mo. 1975). In the Holmes case, the defendant was a clerk operator for Western Union, who received money from customers desiring to purchase Western Union money orders. The money received by the clerk was not given to the employer but converted to his own use. The defendant transmitted the wires transferring the funds paid for by the customers even though the funds were not paid to Western Union. Judge Oliver, at page 1081, held as follows:

> "Principles applied in Maze require this Court to conclude that the transmittal of the Western Union money orders cannot be said to have been done 'for the purpose of executing' defendant's assumed fraudulent scheme or artifice, within the meaning of § 1343. Congress has not yet made embezzlement from companies which transmit wires in interstate commerce a federal offense. Although § 1343 is a relatively

> recent statute, it, like the mail fraud statute, 'does not purport to reach all frauds, but only those limited instances in which the use of [wire communications] is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.' Kann v. United States, 323 U.S. at 95, 65 S.Ct. at 151."

In the Holmes case, the court stated that the legislative history of the comparatively recently enacted § 1343 shows that it was initially directed against "fraud by radio" and was enacted as a "tag-end amendment to the 1952 amendments to the Communications Act".

The fact that the TWA computer utilizes telephone lines in transmitting wire impulses to Kansas City, does not confer federal jurisdiction. In Comtronics, Inc. v. Puerto Rico Telephone Company, 553 F. 2d 701 (C.A. 1, 1977), the Court of Appeals for the First Circuit held that although AT&T was a common carrier and subject to all the provisions of the Communications Act, a nonsubsidiary "connecting" carrier such as plaintiff did not have any duty imposed upon it and was not subject to the Federal Communications regulations. In looking at the legislative history and intent, the court

found that the Communications Act was to subject the burgeoning power of near monopolies such as AT&T to more effective federal regulation but to exempt tiny mostly rural telephone companies from federal regulation. 553 F.2d at 706. In the Comtronics case the Puerto Rico Telephone Company was a communications facility in the market of providing communications services. TWA is not a Federal Communications facility; it is not an industry regulated by the Federal Communications Commission; it is not in the business of providing the public with wire services or communications; but, rather, it utilizes its owned and operated computers for the purpose of providing air transportaiton.

The passengers who paid for tickets boarded their planes and arrived at their destinations. They were not defrauded by any of the facts alleged in the indictment or established at the trial. They paid their money to the ticket sales agent. That the ticket sales agent did not pay the money to his employer is a matter between the employee and the employer and is not a matter of public concern nor is it one covered by the Federal

Communications Act of 1934 as amended by the Act of 1952.

Since the analogy is made between the mail fraud statute and the wire fraud statute, it is respectfully submitted that the present factual situation would be analogous to a company which had a large amount of mail prepared, inserted in envelopes and stamped ready for mailing but who decided then to engage Purolator or Air Express or some other facility to transport it interstate to a subsidiary office of the company. Certainly the transportation by one other than the Postal Service would not confer federal jurisdiction under the mail fraud statute. Similarly, TWA has its computer in Pittsburgh, Pennsylvania and desires to send wire communications to its computer in Kansas City, Missouri to print tickets in Pittsburgh for sale to its passengers. The use of the computer is not the use of a wire communication regulated by the Federal Communications Act. If the computer were in Pittsburgh instead of Kansas City, there would be no federal jurisdiction. It should be apparent that TWA

cannot by its act of locating its computer in Kansas City confer jurisdiction in the federal courts to prosecute embezzlement by an employee under the facts here present.

Conclusion

The general rule that criminal statutes should be strictly construed applies to the within statute. When the legislative history is reviewed and it is noted that the wire fraud statute is an amendment to the Federal Communications Act of 1934 and that Act was passed to protect the public from fraudulent representation made over radio and television broadcasting, it is respectfully submitted that the strict construction principle requires that this statute be limited to public fraud and to matters involving the Federal Communications Act.

The Federal Communications Act has no applicability to any of the facts in issue in the indictment presented in this case. The Federal Communications Commission did not license any of the facilities used in connection with the

ticketing of passengers or checking of reservations by TWA over its intra-company owned computer process.

Since no public communication facilities were involved, the wire fraud statute is not applicable and does not proscribe the conduct alleged in the indictment and developed at the trial. The entire legislative history of the Act indicates its purpose was to regulate the broadcasting industry which was then growing. Television was in its infancy and computers of the type involved in this case were practically nonexistent.

The wire fraud statute was not enacted to cover the instant fact situation any more than the mail fraud statute was enacted to cover the situation where a secretary embezzles funds from her employer although the funds are received by reason of the use of the mails to send bills to patients or clients.

The wire fraud statute, like the mail fraud statute, does not purport to reach all frauds but

only those limited instances where the use of wire communications involves facilities regulated by the Federal Communications Act and involves fraud upon the public not the employer. Employer fraud, if any, should be left to be dealt with by appropriate State law.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1793

UNITED STATES OF AMERICA

v.

VINCE GIOVENGO,
SAMUEL PALADINO,

Samuel Paladino,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Crim. No. 80-00033-02

Argued November 6, 1980

Before: ADAMS and SLOVITER, *Circuit Judges*, and
BROTMAN, *District Judge**

(Filed December 31, 1980)

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* Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey.

OPINION OF THE COURT

ADAMS, *Circuit Judge.*

In this case, Samuel Paladino appeals from convictions for transgressing the federal wire fraud statute, 18 U.S.C. §1343 (1976), and for conspiring to commit wire fraud in violation of 18 U.S.C. §371 (1976).

The facts, as they appear from the evidence viewed in the light most favorable to the government,[1] indicate that Paladino and Vincent Giovengo devised and executed a scheme to defraud Trans World Airlines (TWA) of money paid by passengers who purchased one-way airline tickets with cash. TWA employed both Paladino and Giovengo as customer service agents at the Greater Pittsburgh Airport. Generally, Giovengo sold tickets, while Paladino assisted passengers boarding the TWA aircraft.

When a passenger approaches a TWA agent at an airport with a request to purchase a ticket, the agent enters ticket information into a TWA computer terminal. The terminal transfers a wire signal to interstate telephone circuits leased by TWA from the American Telephone and Telegraph Company (AT&T), and the signals are transmitted to the main TWA computer located in Kansas City, Missouri. The Kansas City computer then transmits a return signal over the telephone lines to the originating airport terminal, and the requested ticket is imprinted by a printing machine. The ticket itself contains several pages: a credit card charge form which is forwarded to a credit company if the passenger charges the ticket, but which is discarded if the sale is for cash; an auditor's coupon retained by TWA; several flight coupons; and the passenger's receipt.

Under the arrangement in question, when a customer purchased a one-way ticket with cash, Giovengo

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1. *See* Burks v. United States, 437 U.S. 1, 17 (1978); Glasser v. United States, 315 U.S. 60, 80 (1942).

would present the customer with the flight coupon required in order to board the aircraft. Instead of handing the customer his passenger receipt, however, Giovengo would present the customer with the credit charge form which should have been discarded inasmuch as the transaction was for cash. Giovengo would keep the auditor's coupon, all extra flight coupons, and the passenger receipt. The passenger would then proceed to the boarding gate, where Paladino would collect the flight coupon and issue the traveller a boarding pass. After the flight departed, Giovengo and Paladino would reinsert the flight coupon into the pages of the ticket, thereby reassembling all the pages of the original ticket except for the charge card forms. The entire ticket would then be marked void and sent to TWA's accounting department. Since the ticket had been voided, the accounting office did not look for a corresponding cash amount. Giovengo and Paladino would divide between themselves the money that passengers had paid for the tickets.

This fraudulent scheme came under scrutiny when a TWA cashier noticed that some of the voided tickets did not contain all their original flight coupons. After the two men were indicted, Giovengo pleaded guilty to conspiracy to commit wire fraud and testified as a government witness at Paladino's trial. A jury convicted Paladino on six counts of wire fraud and one count of conspiracy to commit wire fraud.

The federal wire fraud statute, 18 U.S.C. §1343 (1976), provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, scheme or artifice, shall be

> fined not more than $1,000 or imprisoned not more than five years, or both.

Paladino maintains that §1343 does not apply to all interstate wire communications, but only to those regulated by the Federal Communications Commission (FCC). He goes on to contend that since TWA is not a common carrier regulated by the FCC, transmissions over the interstate lines it leases are not within the jurisdiction of FCC regulation, and fraudulent use of those wires cannot constitute a violation of §1343.

We find no merit in this argument. Nothing in the language of §1343 suggests that its scope is limited to fraud committed by use of interstate wires subject to FCC regulation.[2] Instead, the terms of the statute indicate that it applies to anyone who commits fraud "by means of wire, radio, or television communication in interstate or foreign commerce." The legislative history of §1343 also fails to confirm Paladino's theory. Paladino correctly points out that §1343 was originally enacted as part of the 1952 Amendments to the Communications Act of 1934, c. 652 tit. I, 48 Stat. 1064, *codified* at 47 U.S.C. §151 et seq. Although the 1952 Amendments dealt largely with the regulatory powers of the FCC, it does not follow, as Paladino asserts, that §1343 must be construed as restricted to communications subject to regulation by the Commission. On the contrary, the legislative history suggests that Congress wished to prohibit as much wire fraud as it could constitutionally make unlawful,[3] limited only by a desire to avoid "Federal intrusion upon the police power of the States." *See* H.R. Rep. No. 388, 82d Cong., 1st Sess. 3 (1951). It has been suggested, for example, that irrespective of any constitu-

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2. Not all transmissions over interstate wires are regulated by the FCC; 47 U.S.C. §152(b) (1976) identifies several forms of interstate communication over which the Commission may not assert jurisdiction.

3. Paladino does not claim that Congress lacks constitutional authority to forbid the activity in which he engaged.

tional limitations that might stem from the interstate commerce clause, prosecution of a localized fraud is best left to local enforcement authorities. *See id.* at 8-9 (letter from Justin Miller). Concern for the integrity of local law enforcement is inapposite to the case before us, however. Paladino and Giovengo executed their fraudulent scheme at an international airport from which flights originate to all parts of the world; the tickets with which they tampered had provided travellers with transportation to places outside of Pennsylvania; the victim of their fraud was TWA, a large corporation doing business throughout the United States and the rest of the world; and during the course of their fraudulent activity, the two men made use of a communications network linking the TWA computer in Kansas City to terminals in Pittsburgh. These considerations persuade us that the scheme we are asked to assess does not fall within the category of localized fraud which the legislative history suggests that Congress intended to exclude from the scope of §1343.

Even if federal regulation were a predicate for application of §1343, the fraudulent scheme engaged in by Paladino and Giovengo would not for that reason fall outside the scope of the statute. The lines over which the two men transmitted messages from Pittsburgh to Kansas City were owned and maintained by AT&T, and were merely leased by TWA. AT&T is, of course, a common carrier of messages by wire, as defined by 47 U.S.C. §153(b) (1976), and its interstate telephone lines are subject to the jurisdiction of the FCC and within the regulatory provisions of the Federal Communications Act, *see Comtronics, Inc. v. Puerto Rico Telephone Co.*, 553 F.2d 701, 704 (1st Cir. 1974).[4]

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4. While TWA is not itself a "common carrier" for purposes of FCC jurisdiction, it does not follow that TWA is therefore incapable of violating the wire fraud act through its use of interstate communications. TWA might be compared to a user of the telephone who

In order to resolve the present appeal, we must next ascertain whether Paladino and Giovengo used interstate wires "for the purpose of executing" their scheme to defraud. The language of §1343, forbidding only those communications transmitted "for the purpose of executing" a fraudulent scheme, parallels that of the mail fraud statute, 18 U.S.C. §1341 (1976).[5] In light of the similarity of the language employed in the two statutes, this Court has observed that "they are in this regard *in pari materia* and are, therefore, to be given similar construction. . . . Accordingly, the cases construing the mail fraud statute are applicable to the wire fraud statute as well." *United States v. Tarnopol*, 561 F.2d 466, 475 (3d Cir. 1977).

The Supreme Court has considered the scope of the mail fraud (and by implication, the wire fraud) statute on several occasions. In *Kann v. United States*, 323 U.S. 88, 95 (1944), the Court stated:

NOTE 4 — *(Continued)*
although he is not himself subject to regulation by the FCC, may nonetheless violate §1343 by attempting to obtain money through false representations transmitted by means of interstate telephone. *See* United States v. Cowart, 595 F.2d 1023, 1031 n.10 (5th Cir. 1979); United States v. Wise, 553 F.2d 1173, 1174 (8th Cir. 1977); United States v. Freeman, 524 F.2d 337, 339 (7th Cir. 1975), *cert. denied*, 424 U.S. 920 (1976).

5. 18 U.S.C. §1341 (1976) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

> The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mail is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.

See also Pereira v. United States, 347 U.S. 1, 8 (1954) (a federal violation exists if the use of the mails is "incident to an essential part of the scheme"). The Supreme Court has most recently applied these principles in *United States v. Maze*, 414 U.S. 395 (1974). Maze had stolen his roommate's BankAmericard, and had used it to obtain food and lodging at motels in California, Florida, and Louisiana. Each of these establishments mailed to the bank that had issued the credit card invoices representing goods and services furnished to the defendant. The mail fraud count of the indictment charged that the defendant knew that each merchant would cause the sales slips for the purchases to be delivered by mail to the bank. The indictment also charged that the delay in this mailing would enable the defendant to continue to purchase goods with the stolen credit card.

The Court reversed defendant's conviction for mail fraud, finding that the mailings were not "sufficiently closely related to respondent's scheme to bring his conduct within the statute." The Court noted that "[r]espondent's scheme reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss. Indeed, from his point of view, he probably would have preferred to have the invoices misplaced by various motel personnel and never mailed at all." 414 U.S. at 402.

Use of interstate wires was integral to Paladino's scheme in a way that use of the mails was not essential for Maze. Authorization for the printing of TWA airline tickets comes from Kansas City, and communications between the airport terminal at which a ticket request is

made and the Kansas City computer which coordinates sales are carried over interstate wires. Without access to interstate transmissions, Paladino and Giovengo would have had no tickets to sell to TWA customers. Unlike Maze, Paladino would not have preferred to have had the interstate communications stop, for in that event he would have had no tickets to present to the customers. The use of interstate communications was thus "incident to an essential part of the scheme." *Pereira v. United States*, 347 U.S. at 8.

Our decision in *United States v. Tarnopol*, 561 F.2d 466 (3d Cir. 1977), also suggests that the use of the wires in the present case was related to the fraudulent scheme in a sufficiently close manner so as to bring the conduct of Paladino and Giovengo within the ambit of the statute. Defendants in *Tarnopol* were officers of a corporation engaged in selling and marketing phonographic recordings manufactured by a different firm. After the manufacturer had produced recordings, it shipped them directly to customers in accordance with directions received from defendants. The manufacturer then mailed to the defendants' corporation a "packing slip" or shipping document. Defendants intercepted these slips and prevented them from being recorded on ledgers maintained by their company. In this way they improperly diminished the payment of royalties to artists, song writers and publishers to whom the company owed compensation based on sales.

The mailings relied upon by the government in support of its charges of mail fraud were the packing slips mailed by the manufacturer to defendants' corporation. We held, however, that this use of the mails did not constitute a violation of the statute. Judge Maris noted that the use of the mails was itself "intrinsically devoid of any element of fraud," and that "[i]t was only after the packing slips were received by [the defendants] that they were used . . . as a convenient means of distinguishing those sales to be placed on the books from those to be

included in the fraudulent scheme." *Id.* at 472. The Court concluded that the perpetrators of the fraudulent scheme has used the mails "merely as a convenient but not essential tool in carrying out [their] object." *Id.*

In Paladino's case, by contrast, resort to interstate wires was "essential" rather than "convenient" to the scheme in question, inasmuch as use of the computer link-up was necessary in order to print the tickets sold to TWA passengers. Whereas the court in *Tarnopol* could compare the case before it to *Maze* and conjecture that "it would appear that the fraud would have been better served if no packing slips had been in existence," *United States v. Tarnopol*, 561 F.2d at 274, a similar analysis cannot logically apply to the present case. If Paladino and Giovengo had had no access to the TWA computer system, they would have had no tickets to sell, and their plan to defraud the airline could never have succeeded.[6]

We conclude that Paladino's use of interstate wires was "for the purpose of executing" the fraudulent scheme he devised with Giovengo. Paladino's conduct was therefore in violation of the federal wire fraud statute.

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6. Paladino's reliance on United States v. Holmes, 390 F. Supp. 1077 (W.D. Mo. 1975), is also misplaced. In *Holmes*, the government's theory was that the defendant's use of the wires helped conceal his embezzlement, thereby delaying complaint to the authorities and making apprehension of defendant less likely. The court in *Holmes* held that theory insufficient to establish a violation of §1343, relying on United States v. Maze, 414 U.S. 395 (1974). Paladino and Giovengo, however, did not make use of the wires in order to conceal their fraud. Rather, communication with the Kansas City computer was a prerequisite for successful execution of their fraudulent plan. *See also* United States v. Brown, 583 F.2d 659, 664-66 (3d Cir. 1978) (mailings taking place after the object of the scheme has been accomplished are not sufficiently related to the plan to support a mail fraud conviction), *cert. denied*, 440 U.S. 909 (1979).

For the reasons set forth above, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix B - Judgment

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 80-1793

UNITED STATES OF AMERICA

vs.

GIOVENGO, Vince
PALADINO, Samuel

Samuel Paladino,
Appellant

(D.C. Crim. No. 80-00033-02)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS and SLOVITER, Circuit Judges
and BROTMAN, District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western

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*Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey sitting by designation.

District of Pennsylvania and was argued by counsel on November 6, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 22, 1980, be, and the same is hereby affirmed.

ATTEST:

Sally Mrvos
Clerk

December 31, 1980

Appendix C - Judgment on Rehearing

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 80-1793

UNITED STATES OF AMERICA

vs.

VINCE GIOVENGO, et al.
SAMUEL PALADINO, Appellant

SUR PETITION FOR REHEARING
EN BANC

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, Circuit Judges, and BROTMAN, District Judge.

The petition for reharing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a

majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Arlin M. Adams

Circuit Judge

Dated: January 26, 1981